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PUBLIC HEARING
PACIFIC SHORES PROPERTIES
Date: 03/25/09

TAB 7

**Hearing Officer's
Resolution No. HO-2009-017 Denying
Request No. 1 of Pacific Shores' Reasonable
Accommodation Request**

(July 2, 2009)

RESOLUTION NO. HO-2009-017

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITH PREJUDICE REQUEST NO. 1 OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2008-001 FOR AN EXISTING SOBER LIVING FACILITY LOCATED AT 3309 CLAY STREET, 492 ORANGE AVENUE, AND 492 ½ ORANGE AVENUE (PA 2008-181).

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings; and

WHEREAS, the adoption of Ordinance No. 2008-05 amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

WHEREAS, Ordinance No. 2008-05 added Chapter 20.98 to the NBMC. Chapter 20.98 sets forth a process to provide reasonable accommodations in the City's zoning and land use regulations, policies, and practices when needed to provide an individual with a disability an equal opportunity to use and enjoy a dwelling; and

WHEREAS, an application was filed by Pacific Shores Properties, with respect to properties located at 3309 Clay Street, 492 Orange Avenue, and 492 ½ Orange Avenue, and legally described as Lot 2 and Lot 1 in Block 6 of Tract No. 27 in the City of Newport Beach, County of Orange, State of California (APN 425-282-02 and 425-282-01), requesting approval of the following five requests for reasonable accommodation:

1. That residents of its facility at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code;
2. That the City no longer classify or treat the properties at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as "Residential Care Facilities," as defined by NBMC Section 20.05.010;
3. That the City classify the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use;
4. That all code provisions applicable to the use of 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue (including Zoning Code, Building Code, fire safety and any other applicable code) be applied to those properties in the same manner that those codes are applied and enforced to single family and two family residential uses located in residential districts zoned R-2; and
5. That the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit.

WHEREAS, a public hearing was held on March 25, 2009, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and

purpose of the meeting was given in accordance with the Municipal Code. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Thomas W. Allen, Hearing Officer for the City of Newport Beach; and

WHEREAS, pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on findings, all of which are required for approval.

WHEREAS, with respect to Reasonable Accommodation Request No. 1, that residents of its facility located at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code, not all of the five findings required can be made pursuant to Section 20.98.025 (B) of the NBMC, as follows:

1. **Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.**

Facts in support of finding. The applicant submitted a statement signed by the facility manager that every resident of the facility is in recovery from alcohol or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

2. **Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.**

Facts do not support the finding. The request to be considered a single housekeeping unit is essentially a request to be exempted from all of the provisions of Ordinance No. 2008-05 which place any sort of reasonable regulation on the operations of residential care facilities.

The applicant asserts that being treated as a single housekeeping unit is necessary because residents cannot live independently without the threat of relapse, because the environment provided by the facility is necessary to achieve an opportunity for residents to live in a setting which is a self-paced recovery option that provides time for personal psychological growth while avoiding the use of alcohol and other substances. The applicant also asserts that without the sober living environment offered by the facility, residents of the facility would not be able to live in a supportive environment in a residential area.

The Hearing Officer finds that total exemption from the provisions of Ordinance No. 2008-05 is not necessary to afford residents of the facility the opportunity to live in and enjoy a dwelling or a similar sober living setting.

The Hearing Officer finds that the facility does not operate in manner consistent with the NBMC definition of a single housekeeping unit. The NBMC Section 20.03.030 (Definitions) defines a single housekeeping unit as:

"The functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit, including the joint use of and responsibility for common areas, and sharing household activities and responsibilities such as meals, chores, household maintenance, and expenses, and where, if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, under a single written lease with joint use and responsibility for the premises, and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager."

The facility's operations most closely resemble a boarding house use. Copies of leases submitted to the California Department of Alcohol and Drug Programs (ADP), entitled "Agreement to Stay in My House," indicate that each resident enters a separate written agreement to reside at the facility. Based upon the applicant's characterization of the facility as being one of leased rooms to tenants and the use pattern described by the individual leases, the facility's operations are much closer to the NBMC's definition of a boarding house or group residential use than a single housekeeping unit. Except for the fact that facility residents are recovering alcoholics, the facility would be classified as a prohibited Group Residential use, or a Boarding or Rooming House as that term is defined in NBMC Section 20.05.030. ("Residential Use Classifications: A residence or dwelling unit, or part thereof, wherein a room or rooms are rented under two or more separate written or oral rental agreements, leases or subleases or combination thereof . . . ")

No evidence was provided that clients are an interactive group of persons jointly occupying a single dwelling unit who share common areas. It appears there is no joint responsibility for meals or expenses, no single written lease, and the makeup of the household is determined by the facility operator rather than the residents. Furthermore, contradictory information exists in the record, submitted by the applicant in 2007, regarding whether the facility was a sober living facility or a group of boarding houses.

Pursuant to NBMC Section 20.98.025(C), the City may consider the following factors in determining whether the requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

- A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

If the requested accommodation were to be granted, any number of the applicant's current and potential clients could live in the home located in an R-2 District along with other individuals in recovery. This situation can serve to affirmatively enhance the quality of life of a person in recovery from addiction, unless overcrowding of the facility or institutionalization of the neighborhood interferes with the resident's re-integration into society.

- B. Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.*

The Hearing Officer finds that the exemption requested goes beyond what is necessary to achieve the goal of affording disabled individuals an equal opportunity to enjoy the housing type of their choice. The City indicated that more narrowly tailored exemptions could be requested by the applicant that would enable disabled individuals to reside at the applicant's facility, and the applicant submitted additional requests as a result.

- C. In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

The applicant did not submit evidence that treating the facility as a single housekeeping unit is necessary to make the facility viable in light of the current market for the type of services it provides. The applicant objected to requests by the City for such evidence. Therefore, the Hearing Officer is unable to determine that being treated as a single housekeeping unit is necessary for the facilities to be financially viable.

- D. In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

The City has estimated that there are approximately 233 approved sober living beds in the City. Operators of many sober living facilities within the City have reported decreased census and vacant beds, which could afford potential Pacific Shores clients an equal opportunity to live in a sober living environment. The evidence presented as part of the application does not support the applicant's contention that treating residents of its facility as a single housekeeping unit will change the availability of the existing supply of facilities of a similar nature, or afford them a substantially greater access to an equal opportunity to live in a residential setting.

3. **Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.**

Facts in support of finding. The Hearing Officer finds that treating the facility as a single housekeeping unit will not impose a currently identifiable undue financial or administrative burden on the City. However, in making this finding, it is noted that approximately 56 to 58 individuals could be housed at the three properties if some rooms not currently labeled as "bedrooms" on plans on file at the City were used as bedrooms. If resident populations are unregulated and previous code violations associated with the property were continued, currently unidentifiable financial or administrative burdens could arise as a result.

4. **Finding: That the requested accommodation will not result in a fundamental alteration in the nature of the City's zoning program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.**

Facts do not support the finding. The purpose of the NBMC's definition of a single housekeeping unit is to allow the City to determine whether groups of related or unrelated individuals are living together in a dwelling as a single housekeeping unit. This definition is necessary because of the persistent attempts by property owners acting as landlords to establish illegal boarding houses and illegal units in dwellings within the City.

Groups living as a single housekeeping unit are permitted to live together in any residential zone in Newport Beach. Groups not living as a single housekeeping unit are prohibited from establishing residences in any of the City's residential zones, with the single exception of those groups not living as a single housekeeping unit in residential care facilities of any size. All residential care facilities in the City have already received a reasonable accommodation from the NBMC restrictions on groups not living as a single housekeeping unit through provisions of the NBMC that offer opportunities for new facilities to be established, and existing facilities to continue in their current locations, subject to approval of a use permit with appropriate impact mitigation. Licensed facilities housing six or fewer residents are permitted in any residential zone of the City.

Although the residents of residential care facilities receive preferential treatment because of their disabled status, the NBMC applies regulations to unlicensed and larger (more than seven residents) licensed facilities. These regulations are in place to ensure that the fundamental purposes of the Zoning Code can be achieved, and to ensure that the adverse secondary impacts higher density residential care facilities may have on the surrounding neighborhood can be mitigated. If a residential care facility is treated as a single housekeeping unit, it is entirely exempt from any of the reasonable controls the City might place on the facility, and the City would be unable to make any reasonable effort to reduce the adverse secondary impacts resulting from the facility such as noise, overcrowding, unruly

behavior by residents of applicant's facility to the detriment of neighbors, the disproportionate consumption of available on-street parking, and the overconcentration of facilities within a single block to the point of creating a quasi-institutional environment in this neighborhood.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program:

A. Whether the requested accommodation would fundamentally alter the character of the neighborhood.

Since the establishment of the first of the dwellings as a sober living environment, a number of adverse secondary impacts have been reported to the City by residents of the neighboring properties, thereby altering the character of the neighborhood. Some of the impacts reported associated with the operation of the facility include, but are not limited to:

- Meetings held at one or more of the applicant's facilities
- Excessive use of on-street parking by facility residents and their guests
- Secondhand smoke
- Noise late at night

B. Whether the accommodation would result in a substantial increase in traffic or insufficient parking.

The applicant has stated that residents are permitted to have personal vehicles at the properties, but that few residents own cars. The applicant has stated that "all park along Old Newport or along the commercial park area on Orange. No resident parks along Clay or the non-commercial parking area along Orange (i.e., Orange NE of Clay)."

Each building at the subject site provides two enclosed parking spaces, consistent with the NBMC parking requirement of two parking spaces per dwelling unit for single-family and two-family residential uses. The NBMC parking requirement for residential care facilities is one off-street parking and loading space for every three beds. As a residential care facility, with 50 resident clients, the Pacific Shores facility would be required to provide 17 off-street parking spaces. Since the facility does not provide the required 17 off-street parking spaces, granting the requested accommodation would result in insufficient on-site parking.

The Institute of Transportation Engineers (ITE) establishes standards for trip generation rates based on the use classification of a site. In the case of a single family dwelling, the standard trip rate is 9.57 average daily trips per dwelling, and for

duplexes the standard trip rate is 6.72 average daily trips per dwelling. Trip rates for residential care facilities are 2.74 average daily trips per each occupied bed. Based on these standards, a 50-bed residential care facility would generate approximately 137 average daily trips. The evidence shows this facility will generate average daily trips substantially in excess of the surrounding single- and two-family dwellings.

C. Whether granting the requested accommodation would substantially undermine any express purpose of either the City's General Plan or an applicable Specific Plan.

General Plan Policy LU 6.2.7 requires the City to regulate day care and residential care facilities to the maximum extent allowed by federal and state law. A request for reasonable accommodation is consistent with this policy. The City adopted Ordinance No. 2008-005 in order to implement General Plan Policy LU 6.2.7. Granting the reasonable accommodation request to treat the facility as a single housekeeping unit rather than as a residential care facility would exempt the facility from the provisions of Ordinance No. 2008-005, and preclude the City from applying any reasonable regulations on the facility, thereby undermining the express purpose of the General Plan with regard to these facilities.

The Hearing Officer finds that the facility does not operate in manner consistent with the NBMC definition of a single housekeeping unit, as provided for in NBMC Section 20.03.030 (Definitions):

"The functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit, including the joint use of and responsibility for common areas, and sharing household activities and responsibilities such as meals, chores, household maintenance, and expenses, and where, if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, under a single written lease with joint use and responsibility for the premises, and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager."

There was no evidence provided that clients may be an interactive group of persons jointly occupying a single dwelling unit and sharing common areas. There is no evidence of joint responsibility for meals or expenses or a single written lease, and the members of the household are selected by the facility operator rather than by other residents. The applicant characterizes the facility as one of leased rooms to tenants with a use pattern described by the individual leases as more closely resembling a boarding house or group residential use, as defined by the NBMC, than a single housekeeping unit. Except for the fact that facility's residents are recovering alcoholics, the facility would be classified as a prohibited Group Residential use, or a

Boarding or Rooming House as that term is defined NBMC 20.05.030. A and C, "Residential Use Classifications, "A residence or dwelling unit, or part thereof, wherein a room or rooms are rented under two or more separate written or oral rental agreements, leases or subleases or combination thereof..." and "Shared living quarters, occupied by two or more persons not living together as a single housekeeping unit."

- D. *In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

There are no other documented facilities, similar in nature or operation to the subject facility, within the vicinity of the subject facility. In considering whether granting the requested accommodation would create an institutionalized environment, however, it is noted that approximately 56 to 58 individuals could be housed at the three subject facilities if some rooms, not currently labeled as "bedrooms" on the plans on file at the City, were used as bedrooms. An unregulated occupancy of the facility would result in an overconcentration of the use of the facility and the potential institutionalization of the residential neighborhood with associated adverse secondary impacts such as noise, overcrowding, unruly behavior by residents of the facility, a disproportionate utilization of available on-street parking by the facility, and traffic impacts.

5. **Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.**

Facts in support of finding. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others," (refer to 42 U.S.C. § 3604(f)(9)). This is a very limited exception and can only be used when, based on the specific facts of a situation, a requested accommodation results in a significant and particularized threat. Federal cases interpreting this exception in the Fair Housing Amendment Act, adopted in 1988, indicate that requested accommodations cannot be denied due to generalized fears of the risks posed by disabled persons.

WHEREAS, the project qualifies for a Categorical Exemption pursuant to Section (Section 15061(b)(3) (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby denies with prejudice Request No. 1 of Reasonable Accommodation No. 2008-001.

Section 2. This action shall become final and effective fourteen days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20 Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, APPROVED AND ADOPTED THIS 2nd DAY OF July 2009.

By: _____

Thomas W. Allen

Thomas W. Allen, Hearing Officer

ATTEST:

Shana Shady

City Clerk



TAB 8

Hearing Officer's
Resolution No. HO-2009-018 Denying
Request No. 2 of Pacific Shores' Reasonable
Accommodation Request

(July 2, 2009)

RESOLUTION NO. HO-2009-018

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITH PREJUDICE REQUEST NO. 2 OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2008-001 FOR AN EXISTING SOBER LIVING FACILITY LOCATED AT 3309 CLAY STREET, 492 ORANGE AVENUE, AND 492 ½ ORANGE AVENUE (PA 2008-181).

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings; and

WHEREAS, the adoption of Ordinance No. 2008-05 amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

WHEREAS, Ordinance No. 2008-05 added Chapter 20.98 to the NBMC. Chapter 20.98 sets forth a process to provide reasonable accommodations in the City's zoning and land use regulations, policies, and practices when needed to provide an individual with a disability an equal opportunity to use and enjoy a dwelling; and

WHEREAS, an application was filed by Pacific Shores Properties, with respect to properties located at 3309 Clay Street, 492 Orange Avenue, and 492 ½ Orange Avenue, and legally described as Lot 2 and Lot 1 in Block 6 of Tract No. 27 in the City of Newport Beach, County of Orange, State of California (APN 425-282-02 and 425-282-01), requesting approval of the following five requests for reasonable accommodation:

1. That residents of its facility at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code;
2. That the City no longer classify or treat the properties at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as "Residential Care Facilities," as defined by NBMC Section 20.05.010;
3. That the City classify the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use;
4. That all code provisions applicable to the use of 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue (including Zoning Code, Building Code, fire safety and any other applicable code) be applied to those properties in the same manner that those codes are applied and enforced to single family and two family residential uses located in residential districts zoned R-2; and
5. That the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit.

WHEREAS, a public hearing was held on March 25, 2009, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and

purpose of the meeting was given in accordance with the Municipal Code. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Thomas W. Allen, Hearing Officer for the City of Newport Beach; and

WHEREAS, pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on findings, all of which are required for approval.

WHEREAS, with respect to Reasonable Accommodation Request No. 2, that the City no longer classify or treat the properties at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as "Residential Care Facilities," as defined by NBMC Section 20.05.010; not all of the five findings required can be made pursuant to Section 20.98.025 (B) of the NBMC, as follows:

1. **Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.**

Facts in support of finding. The applicant submitted a statement signed by the facility manager that every resident of the facility is in recovery from alcohol or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

2. **Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.**

Facts do not support the finding. In the request for reasonable accommodation, the applicant requests that the facility not be treated as a residential care facility, and states that it is necessary the facility be treated as a single housekeeping unit. The applicant asserts that the residents cannot live independently without the threat of relapse, because the environment provided by the facility is necessary to achieve an opportunity for residents to live in a setting which is a self-paced recovery option that provides time for personal psychological growth while avoiding the use of alcohol and other substances. The applicant also asserts that without the sober living environment offered by the facility, residents of the facility would not be able to live in a supportive environment in a residential area. The Hearing Officer finds that the requested accommodation is not necessary because the requested exemption goes beyond that which is necessary to achieve the goal of enabling disabled individuals to reside at the applicant's facility.

The residential use classifications listed in Section 20.10.020 of the NBMC are limited to:

- Day Care, Limited (*Large and Small Child Care Homes – not applicable*)
- Group Residential (*Not Single Housekeeping Units – prohibited in all residential districts*)
- Multifamily Residential (*Single Housekeeping Units a prerequisite to be considered MFR use*)
- Parolee/Probationer Homes (*Prohibited in all residential districts*)
- Residential Care (General Licensed, General Unlicensed, Small Licensed, Small Unlicensed) (*Not Single Housekeeping Units, but not prohibited Group Residential because residents are disabled*)
- Integral Facilities/Integral Uses (*Two or more residential care facilities that are integrated components of one operation*)
- Single-Family Residential (*Single Housekeeping Unit a prerequisite to be considered a single family residential use of a dwelling*)
- Two-Family Residential (*Single Housekeeping Units a prerequisite to be considered a two-family residential use of a dwelling.*)

NBMC Section 20.05.030 defines the various Residential Care use classifications as follows:

Residential Care Facilities, General. Any place, site or building, or groups of places, sites or buildings, licensed by the State or unlicensed, in which seven or more individuals with a disability reside who are not living together as a single housekeeping unit and in which every person residing in the facility (excluding the licensee, members of the licensee's family, or persons employed as facility staff) is an individual with a disability.

Residential Care Facilities, Small Licensed. State-licensed facilities that provide care, services, or treatment in a community residential setting for six or fewer adults, children, or adults and children and which are required by State law to be treated as a single housekeeping unit for zoning purposes. Small licensed residential care facilities shall be subject to all land use and property development regulations applicable to single housekeeping units.

Residential Care Facilities, Small Unlicensed. Any place, site or building, or groups of places, sites or buildings, which is not licensed by the State of California and is not required by law to be licensed by the State, in which six or fewer individuals with a disability reside who are not living together as a single housekeeping unit and in which every person residing in the facility (excluding persons employed as facility staff) is an individual with a disability.

The applicant's facility is also considered an Integral Facility. Integral Facility residential use classifications are defined as follows:

Integral Uses. Any two or more licensed or unlicensed residential care programs commonly administered by the same owner, operator, management company or

licensee, or any affiliate of any of them, in a manner in which participants in two or more care programs participate simultaneously in any care or recovery activity or activities so commonly administered. Any such integral use shall be considered one use for purposes of applying Federal, State and local laws to its operation.

If the facility is not treated and classified as a residential care facility or integral facility land use, the most similar land use classification for the subject use is a group residential use, as defined in NBMC Section 20.05.030(C). The group residential use classification is defined as:

Group Residential. Shared living quarters, occupied by two or more persons not living together as a single housekeeping unit. This classification includes, without limitation, boarding or rooming houses, dormitories, fraternities, sororities, and private residential clubs, but excludes residential care facilities (general, small licensed, and small unlicensed) and residential hotels (see Single-Room Occupancy (SRO) Residential Hotels, Section 20.05.050(EE)(4)).

Group residential uses include boarding houses, rooming houses, dormitories, fraternities, sororities, and private residential clubs but expressly exclude residential care facilities; however, group residential uses are not permitted in any residential district in the City. Parolee/Probationer homes are also prohibited in all residential districts.

The remaining applicable land use classifications provided by Section 20.10.020, Single-Family, Two-Family and Multifamily Residential, are land use classifications that are also considered for use by single housekeeping units. If occupancy of a dwelling categorized as a single-family residential use was not conducted as a single housekeeping unit, the occupancy would transform the use of that dwelling to a prohibited group residential use.

The Hearing Officer finds that the facility does not operate in manner consistent with the NBMC definition of a single housekeeping unit, NBMC Section 20.03.030 (Definitions):

"The functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit, including the joint use of and responsibility for common areas, and sharing household activities and responsibilities such as meals, chores, household maintenance, and expenses, and where, if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, under a single written lease with joint use and responsibility for the premises, and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager."

The facility's operations most closely resemble a boarding house use. Copies of leases submitted to ADP, entitled "Agreement to Stay in My House," indicate that each resident enters a separate written agreement to reside at the facility. The applicant characterizes the facility as one of leased rooms to tenants with a use pattern described by the individual lease

that more closely resembles the NBMC definition of a boarding house or group residential use than a single housekeeping unit. Except for the fact that facility residents are recovering alcoholics, the facility would be classified as a prohibited group residential use, or a boarding or rooming house as that term is defined in NBMC 20.05.030. A and C, "Residential Use Classifications, "A residence or dwelling unit, or part thereof, wherein a room or rooms are rented under two or more separate written or oral rental agreements, leases or subleases or combination thereof....," and "Shared living quarters, occupied by two or more persons not living together as a single housekeeping unit."

There was no evidence provided that clients may be an interactive group of persons jointly occupying a single dwelling unit and sharing common areas, of joint responsibility for meals or expenses, or of a single written lease. Additionally, the members of the household are determined by the facility operator and not by other residents. Contradictory information exists in the record, submitted by the applicant in 2007, regarding whether the facility was a sober living facility or a group of boarding houses.

The Hearing Officer has determined that the requested accommodation to not be classified or treated as a residential care facility is not necessary to achieve the goal of providing individuals with a disability an equal opportunity to use and enjoy a dwelling.

Pursuant to NBMC Section 20.98.025(C), the City may consider the following factors in determining whether the requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

- A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

If the requested accommodation were to be granted, that the applicant's current and potential clients could live in the home located in an R-2 District along with other individuals in recovery. This is a situation can serve to affirmatively enhance the quality of life of a person in recovery from addiction, unless overcrowding of the facility or institutionalization of the neighborhood interferes with the resident's re-integration into society.

- B. *Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.*

The Hearing Officer has determined the exemption requested goes beyond what is necessary to achieve the goal of enabling disabled individuals an equal opportunity to enjoy the housing type of their choice. The City indicated that more narrowly tailored exemptions could enable disabled individuals to reside at the applicant's facility, and the applicant submitted additional requests as a result.

- C. *In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

The applicant did not submit evidence that not treating the facility as a residential care facility is necessary to make the facility viable in light of the current market for the type of services it provides. The applicant did not respond to requests by the City for such evidence. Therefore, the Hearing Officer has concluded that not being treated as a use classification other than a residential care facility use is not necessary for the facility to be financially viable.

- D. *In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

The City has estimated that there are approximately 233 approved sober living beds in the City. Operators of many sober living facilities within the City have reported decreased census and vacant beds, which could afford potential Pacific Shores clients an equal opportunity to live in a sober living environment. The evidence presented as part of the application does not support the applicant's contention that not treating the facility as a residential care facility use will change the availability of the existing supply of facilities of a similar nature, or afford disabled individuals a substantially greater access to an equal opportunity to live in a residential setting.

3. **Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.**

Facts in support of finding. The Hearing Officer has determined that treating the facility as a residential care facility would not impose a identifiable undue financial or administrative burden on the City. However, in making this finding, it is noted that approximately 56 to 58 individuals could be housed at the three properties if some rooms not currently labeled as "bedrooms" on plans, on file at the City, were used as bedrooms. If resident populations are unregulated and previous code violations associated with the property were continued, currently unidentifiable financial or administrative burdens could arise as a result.

4. **Finding: That the requested accommodation will not result in a fundamental alteration in the nature of the City's zoning program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.**

Facts do not support the finding. The Hearing Officer finds that other than being treated as a single housekeeping unit, there was no benefit to the applicant for being treated as anything other than a residential care facility. The Hearing Officer also found in the applicant's request for Reasonable Accommodation Request No. 1 that treating the applicant's facility as a single housekeeping unit would fundamentally alter the nature of the City's zoning program. Groups living as a single housekeeping unit are permitted to live together in any residential zone in Newport Beach. The NBMC states that, with the exception of groups living together in a residential care facility, groups not living as a single housekeeping unit are prohibited from establishing residences in any of the City's residential zones.

All residential care facilities in the City have already received a reasonable accommodation from the NBMC restrictions on groups not living as a single housekeeping unit pursuant to provisions of the NBMC allowing new facilities to be established and existing facilities to continue in their current locations, subject to approval of a use permit with appropriate impact mitigation. Licensed facilities housing six or fewer residents are permitted in any residential zone of the City.

Although the residents of residential care facilities receive preferential treatment because of their disabled status, the NBMC applies regulations to unlicensed facilities and large licensed facilities of seven or more residents. These regulations are in place to ensure that the fundamental purposes of the Zoning Code can be achieved and to mitigate the adverse secondary impacts that higher density residential care facilities may have on the surrounding neighborhood. Treating a residential care facility as a single housekeeping unit entirely exempts the facility from any reasonable controls allowed by the City. As such the City is unable to make any reasonable effort to reduce the adverse secondary impacts such as noise, overcrowding, or unruly behavior by residents of the facility, disproportionate use of available on-street parking to the detriment of the neighborhood, and to insure that an overconcentration of facilities within a single block does not occur resulting in a quasi-institutional environment for the neighborhood.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program:

A. Whether the requested accommodation would fundamentally alter the character of the neighborhood.

Since the establishment of the first of the dwellings as a sober living environment, a number of adverse secondary impacts have been reported to the City by residents of the neighboring properties, thereby altering the character of the neighborhood. Some of the impacts reported associated with the operation of the facility include, but are not limited to:

- Meetings held at one or more of the applicant's facilities
- Excessive use on on-street parking by facility residents and their guests
- Secondhand smoke
- Noise late at night

B. Whether the accommodation would result in a substantial increase in traffic or insufficient parking.

The applicant has stated that residents are permitted to have personal vehicles at the properties, but that few residents own cars. The applicant has stated that "all park along Old Newport or along the commercial park area on Orange. No resident parks along Clay or the non-commercial parking area along Orange (i.e., Orange NE of Clay)."

Each building at the subject site provides two enclosed parking spaces, consistent with the NBMC parking requirement for single-family and two-family residential uses. The NBMC parking requirement for residential care facilities is one off-street parking and loading space for every three beds. As a residential care facility, with 50 resident clients, the Pacific Shores facility would be required to provide 17 off-street parking spaces. Since the facility does not provide the required 17 off-street parking spaces, granting the requested accommodation would result in insufficient on-site parking.

The Institute of Transportation Engineers (ITE) establishes standards for trip generation rates based on the use classification of a site. In the case of a single family dwelling, the standard trip rate is 9.57 average daily trips per dwelling, and for duplexes the standard trip rate is 6.72 average daily trips per dwelling. Trip rates for residential care facilities are 2.74 average daily trips per each occupied bed. Based on these standards, a 50-bed residential care facility would generate approximately 137 average daily trips. The evidence shows this facility will generate average daily trips substantially in excess of surrounding single- and two-family dwellings.

C. Whether granting the requested accommodation would substantially undermine any express purpose of either the City's General Plan or an applicable Specific Plan.

General Plan Policy LU 6.2.7 requires the City to regulate day care and residential care facilities to the maximum extent allowed by federal and state law to minimize impacts on residential neighborhoods. The City adopted Ordinance No. 2008-005 in order to implement General Plan Policy LU 6.2.7. Granting the reasonable accommodation request to not classify or treat the facility as a residential care facility, but rather to treat the facility as a single housekeeping unit, would exempt the facility from the provisions of Ordinance No. 2008-005, and preclude the City from applying

any reasonable regulations on the facility, thereby undermining the express purpose of the General Plan with regard to these facilities.

- D. In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

There are no other documented facilities, similar in nature or operation to the subject facility, within the vicinity of the subject facility. In considering whether granting the requested accommodation would create an institutionalized environment, however, it is noted that approximately 56 to 58 individuals could be housed at the three subject facilities if some rooms, not currently labeled as "bedrooms" on the plans on file at the City, were used as bedrooms.

The Hearing Officers finds that the unregulated occupancy of the facility could result in an overconcentration of the use of the facility and the potential institutionalization of the residential neighborhood with potentially associated adverse secondary impacts such as noise, overcrowding, unruly behavior by residents of the facility, a disproportionate utilization of available on-street parking by the facility, and traffic impacts.

Each building at the subject site provides two enclosed parking spaces, consistent with the NBMC parking requirement for single-family and two-family residential uses. The NBMC requires one off-street parking and loading space be provided for every three beds in a residential care facility. As a residential care facility, with 50 resident clients, the Pacific Shores facility would be required to provide 17 off-street parking spaces. The facility does not provide the required 17 off-street parking spaces and the facility utilizes on-street parking for staff and visitors.

The Institute of Transportation Engineers (ITE) establishes standards for trip general rates based on the use classification of a site. The standard trip rate for a single-family dwelling is 9.57 average daily trips per dwelling, and for duplexes the standard trip rate is 6.72 average daily trips per dwelling. Trip rates for residential care facilities are 2.74 average daily trips per each occupied bed. Based on these standards, a 50-bed residential care facility would generate approximately 137 average daily trips.

Based on this evidence, the facility would generate average daily trips substantially in excess of the surrounding single- and two-family dwellings, thereby altering the residential character of the neighborhood to a more institutionalized environment.

5. **Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.**

Facts in support of finding. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others," (refer to 42 U.S.C. § 3604(f)(9)). This is a very limited exception and can only be used when, based on the specific facts of a situation, a requested accommodation results in a significant and particularized threat. Federal cases interpreting this exception in the Fair Housing Amendments Act, adopted in 1988, indicate that requested accommodations cannot be denied due to generalized fears of the risks posed by disabled persons.

WHEREAS, the project qualifies for a Categorical Exemption pursuant to Section (Section 15061(b)(3) (Existing Facilities)). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby denies with prejudice Request No. 2 of Reasonable Accommodation No. 2008-001.

Section 2. This action shall become final and effective fourteen days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20 Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, APPROVED AND ADOPTED THIS 2ND DAY OF JULY, 2009.

By: _____

Thomas W. Allen, Hearing Officer

ATTEST:

Sharon Stanley

Deputy City Clerk



TAB 9

Hearing Officer's
Resolution No. HO-2009-019 Approving
Request No. 3 of Pacific Shores' Reasonable
Accommodation Request

(July 2, 2009)

RESOLUTION NO. HO-2009-019

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH APPROVING REQUEST NO. 3 OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2008-001 FOR AN EXISTING SOBER LIVING FACILITY LOCATED AT 3309 CLAY STREET, 492 ORANGE AVENUE, AND 492 ½ ORANGE AVENUE (PA 2008-181).

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings; and

WHEREAS, the adoption of Ordinance No. 2008-05 amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

WHEREAS, Ordinance No. 2008-05 added Chapter 20.98 to the NBMC. Chapter 20.98 sets forth a process to provide reasonable accommodations in the City's zoning and land use regulations, policies, and practices when needed to provide an individual with a disability an equal opportunity to use and enjoy a dwelling; and

WHEREAS, an application was filed by Pacific Shores Properties, with respect to properties located at 3309 Clay Street, 492 Orange Avenue, and 492 ½ Orange Avenue, and legally described as Lot 2 and Lot 1 in Block 6 of Tract No. 27 in the City of Newport Beach, County of Orange, State of California (APN 425-282-02 and 425-282-01), requesting approval of the following five requests for reasonable accommodation:

1. That residents of its facility at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code;
2. That the City no longer classify or treat the properties at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as "Residential Care Facilities," as defined by NBMC Section 20.05.010;
3. That the City classify the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use;
4. That all code provisions applicable to the use of 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue (including Zoning Code, Building Code, fire safety and any other applicable code) be applied to those properties in the same manner that those codes are applied and enforced to single family and two family residential uses located in residential districts zoned R-2; and
5. That the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit.

WHEREAS, a public hearing was held on March 25, 2009, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and

purpose of the meeting was given in accordance with the Municipal Code. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Thomas W. Allen, Hearing Officer for the City of Newport Beach; and

WHEREAS, Pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on the following findings, all of which are required for approval.

WHEREAS, with respect to Reasonable Accommodation Request No. 3, that the City treat the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use, the required findings of Section 20.98.025(B) of the NBMC, and facts in support of such findings can be made as follows:

1. **Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.**

Facts in support of finding. The applicant submitted a statement signed by the facility manager that every resident of the facility is in recovery from alcohol or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

2. **Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.**

Facts in support of the finding. The applicant requested that the use of the dwellings be "grandfathered" as a nonconforming use, with the intent that classifying the facility as a nonconforming use meant that Pacific Shores could legally continue to operate as it had before Ordinance No. 2008-005 was adopted, and that the ordinance would have no effect on Pacific Shores. However, the City was already treating the dwellings as a nonconforming use. If the Pacific Shores facility were not treated as a nonconforming use, it would be considered an illegal use and thus subject to abatement, both before and after adoption of Ordinance No. 2008-05.

Under NBMC Section 20.62.090(A), nonconforming uses in residential zones that had not received a use permit or reasonable accommodation became subject to abatement on the effective date of the ordinance, February 22, 2008. For nonconforming uses not involved in the administrative process through a use permit or reasonable accommodation application, abatement was to proceed by February 22, 2009, unless the use had applied for and received an extension of the abatement period for amortization purposes.

Evidence exists that some or all of the applicant's dwelling units at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue had not established as residential care occupancies in accordance with requirements of the Newport Beach Municipal Code. The facility appeared to exceed six residents, and had not received a Federal Exception Permit (FEP), required for facilities housing more than six residents under the ordinance in effect prior to the effective date of Ordinance No. 2008-05.

Pacific Shores expressly declined to apply for a use permit required for Residential Care Facilities, General Unlicensed after the effective date of Ordinance No. 2008-05, and did not submit an application for reasonable accommodation until September, 2008. Therefore, prior to September 24, 2008, the date the applicant's first reasonable accommodation application was filed with the City, the use was subject to abatement as an illegal use. As a result, disabled residents residing at the facility at that time would have been deprived of their current housing if abatement had occurred. Therefore, treating the facility as a nonconforming use was necessary to avoid depriving disabled individuals of their housing.

The Hearing Officer determined that the use could continue to be *treated* as a nonconforming use, but was not willing to permanently *classify* the use as nonconforming, or exempt it from the provisions of Ordinance No. 2008-05. Permanently designating an illegal use as a legally established nonconforming use is a broader accommodation than necessary to afford disabled individuals an opportunity to use and enjoy a dwelling. Therefore, although the City cannot "classify" or "grandfather" an illegal use as a nonconforming use through the reasonable accommodation process, it can continue to accommodate the needs of disabled residents by treating the facility as if it were a nonconforming use, for purposes of the current provisions of Ordinance No. 2008-05.

Pursuant to NBMC Section 20.98.025(C), the City may consider the following factors in determining whether the requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

- A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

As stated above, had the City not treated Pacific Shores as if it were a nonconforming use in a residential zone, the facility would have been subject to abatement prior to Pacific Shores' September 2008 filing of an application for reasonable accommodation. Presumably, the quality of life for disabled individuals living on the premises during this time was affirmatively enhanced because residents were not required to leave their current dwelling.

- B. *Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.*

If the City had not treated Pacific Shores as if it were a nonconforming use in a residential zone, the facility would have been subject to abatement prior to Pacific Shores' September 2008 filing of an application for reasonable accommodation, and facility residents could have been denied the housing of their choice.

- C. *In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

The applicant has expressly declined to submit information on financial viability. Therefore, staff was unable to analyze this factor.

- D. *In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

The NBMC authorizes the City to consider other facilities that are of a "similar nature and operation." Through implementation of Ordinance No. 2008-005, it is estimated approximately 233 sober living beds have been approved within the City. Operators of sober living facilities within the City have reported a substantial number of vacant beds, which could provide Pacific Shores' residents with an equal opportunity to live in a sober living environment without the requested accommodation.

3. **Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.**

Facts in support of finding. Treating Pacific Shores as if it were a nonconforming use has not created an undue financial or administrative burden on the City.

4. **Finding: That the requested accommodation will not result in a fundamental alteration in the nature of the City's zoning program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.**

Facts in support of finding. The applicant requested that the use of the dwellings be "grandfathered" as a nonconforming use, with the intent that classifying the facility as a nonconforming use meant that Pacific Shores could legally continue to operate as it had before Ordinance No. 2008-005 was adopted, and that the ordinance would have no effect on

Pacific Shores. There is evidence on file at the City that some or all of the applicant's dwelling units at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue had not established as residential care occupancies in accordance with requirements of the Newport Beach Municipal Code.

The Hearing Officer has determined that permanently designating an illegally established use as a legal nonconforming use, as requested by the applicant, would fundamentally alter the nature of that portion of the zoning program that seeks to discourage illegal uses and treat legally established nonconforming uses in a neutral manner. Treating Pacific Shores more favorably than other nonconforming uses in residential districts by exempting it from the provisions of Ordinance No. 2008-05, as requested by the applicant, would fundamentally undermine some of the purposes for adopting the Ordinance. One of the stated purposes is to:

... to promote the public health, safety, and welfare and to implement the goals and policies of the Newport Beach General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods as primarily residential communities.

and:

... to protect and implement the recovery and residential integration of the disabled, including those receiving treatment and counseling in connection with dependency recovery. In doing so, the City seeks to avoid the overconcentration of residential care facilities so that such facilities are reasonably dispersed throughout the community and are not congregated or over-concentrated in any particular area so as to institutionalize that area.

However, *treating* Pacific Shores as if it were a nonconforming use prior to submittal of its reasonable accommodation application did not fundamentally undermine the basic purposes which Ordinance No. 2008-05 was put in place to achieve. The Hearing Officer has determined that the use could continue to be *treated* as a nonconforming use, but not be permanently *classified* as a nonconforming use or exempted from the provisions of Ordinance No. 2008-05. Permanently designating an illegal use as a nonconforming use is a broader accommodation than necessary to afford disabled individuals an opportunity to use and enjoy a dwelling. Therefore, the Hearing Officer has determined that although the City cannot "classify" an illegal use as a nonconforming use through the reasonable accommodation process, it can continue to accommodate the needs of disabled residents by treating the facility as if it were a nonconforming use, for purposes of the current provisions of Ordinance No. 2008-05.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program:

- A. *Whether the requested accommodation would fundamentally alter the character of the neighborhood.*

Treating Pacific Shores as if it were a nonconforming use will not fundamentally alter the character of the neighborhood. The facility has continued to operate and was not abated. Testimony from neighbors indicated that the facility had an impact on the neighborhood during this period. However, the impacts should not be permanent, as the Hearing Officer's denial of the other reasonable accommodation requests will result with the impacts being mitigated through the discontinued use of the dwellings as a sober living facility. Therefore, treating Pacific Shores as a nonconforming use has not resulted in a permanent fundamental alteration of the character of the neighborhood.

- B. *Whether the accommodation would result in a substantial increase in traffic or insufficient parking.*

For the same reasons given in Factor A, treating Pacific Shores as if it were a nonconforming use has not resulted in a substantial permanent increase in traffic or insufficient parking.

- C. *Whether granting the requested accommodation would substantially undermine any express purpose of either the City's General Plan or an applicable Specific Plan.*

The General Plan Policy LU 6.2.7 provides that the City shall regulate residential care facilities to the maximum extent allowed by federal and state law to minimize impacts on residential neighborhoods. For the same reasons given in Factor A, treating Pacific Shores as if it were a nonconforming use will not substantially undermined the express purpose of the General Plan.

- D. *In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

For the same reasons given in Factor A, treating Pacific Shores as if it were a nonconforming use will not permanently create an institutionalized environment in the neighborhood. In analyzing other requests for reasonable accommodation from Pacific Shores, staff found that granting Pacific Shores approval to continue to operate all three dwelling units at the population levels requested by the applicant (50

residents) would have created an institutionalized environment due to the number of resident clients, and number and proximity of units on a single block housing residential care uses. However, treating Pacific Shores as a nonconforming use did not exempt Pacific Shores from the reasonable accommodation process that would have required any accommodation granted to contain conditions to mitigate institutionalization.

5. **Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.**

This finding can be made. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others." See 42 U.S.C. § 3604(f)(9). This is a very limited exception and can only be used when, based on the specific facts of a situation, a requested accommodation results in a significant and particularized threat. Federal cases interpreting this exception in the FHAA indicate that requested accommodations cannot be denied due to generalized fears of the risks posed by disabled persons.

WHEREAS, the project qualifies for a Categorical Exemption pursuant to Section (Section 15061(b)(3) (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby approves Request No. 3 of Reasonable Accommodation No. 2008-001.

Section 2. This action shall become final and effective fourteen days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20 Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, APPROVED AND ADOPTED THIS 2ND DAY OF JULY, 2009.

By: 
Thomas W. Allen, Hearing Officer

ATTEST:


Deputy City Clerk



TAB 10

Hearing Officer's
Resolution No. HO-2009-020 Denying
Request No. 4 of Pacific Shores' Reasonable
Accommodation Request

(July 2, 2009)

RESOLUTION NO. HO-2009-020

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITH PREJUDICE REQUEST NO. 4 OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2008-001 FOR AN EXISTING SOBER LIVING FACILITY LOCATED AT 3309 CLAY STREET, 492 ORANGE AVENUE, AND 492 ½ ORANGE AVENUE (PA 2008-181).

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings; and

WHEREAS, the adoption of Ordinance No. 2008-05 amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

WHEREAS, Ordinance No. 2008-05 added Chapter 20.98 to the NBMC. Chapter 20.98 sets forth a process to provide reasonable accommodations in the City's zoning and land use regulations, policies, and practices when needed to provide an individual with a disability an equal opportunity to use and enjoy a dwelling; and

WHEREAS, an application was filed by Pacific Shores Properties, with respect to properties located at 3309 Clay Street, 492 Orange Avenue, and 492 ½ Orange Avenue, and legally described as Lot 2 and Lot 1 in Block 6 of Tract No. 27 in the City of Newport Beach, County of Orange, State of California (APN 425-282-02 and 425-282-01), requesting approval of the following five requests for reasonable accommodation:

1. That residents of its facility at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code;
2. That the City no longer classify or treat the properties at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as "Residential Care Facilities," as defined by NBMC Section 20.05.010;
3. That the City classify the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use;
4. That all code provisions applicable to the use of 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue (including Zoning Code, Building Code, fire safety and any other applicable code) be applied to those properties in the same manner that those codes are applied and enforced to single family and two family residential uses located in residential districts zoned R-2; and
5. That the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit.

WHEREAS, a public hearing was held on March 25, 2009, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and

purpose of the meeting was given in accordance with the Municipal Code. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Thomas W. Allen, Hearing Officer for the City of Newport Beach; and

WHEREAS, pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on findings, all of which are required for approval.

WHEREAS, with respect to Reasonable Accommodation Request No. 4, that all code provisions applicable to the use of 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue, including Zoning Code, Building Code, fire safety and any other applicable code, be applied to those properties in the same manner that those codes are applied and enforced to single family and two family residential uses located in residential districts zoned R-2, not all of the five findings required can be made pursuant to Section 20.98.025 (B) of the NBMC, as follows:

1. **Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.**

Facts in support of finding. The applicant has provided a signed statement certifying that all residents of the facility, excluding staff, are individuals in recovery from alcoholism or drug addiction. Federal regulations classify such individuals as disabled.

2. **Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.**

Facts do not support the finding. The Hearing Officer has determined that the requested accommodation is not necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling. The Newport Beach Fire Marshal has indicated that the changes needed for the facility to comply with the California Building Code can be achieved and are not cost prohibitive.

NBMC Section 20.98.025(C) allows the City to consider the following factors in determining whether the requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

- A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

In light of the improvements necessary to bring the facility into compliance with the

California Building Code, the granting of the accommodation to waive the requirements of the California Building Code would place the life of the facility's residents at greater risk, thereby negatively affecting the quality of life of one or more individuals with a disability.

- B. Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.*

The Hearing Officer finds that denying the accommodation will not deprive facility residents an opportunity to enjoy the housing type of their choice, assuming the facility residents have an interest in residing in a safe environment.

- C. In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

The applicant did not presented evidence that bringing the facility into compliance with the California Building Code requirements for R4 occupancies would be financially infeasible or that the facility will not be economically viable as a result of compliance with the California Building Code.

- D. In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

Through implementation of Ordinance No. 2008-005, it is estimated approximately 233 sober living beds have been approved within the City. Most of these beds are in facilities that have similar population density or less population density than the applicant's facility. As operators of other sober living facilities have reported decreased occupancy levels, prospective residents seeking a sober living environment of this type will not be deprived of an equal opportunity to live in a residential setting of similar type.

- 3. Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.**

Facts in support of finding. Granting the requested accommodation would not impose an undue financial or administrative burden on the City. Treating the facility as a single family residential use would not impose a currently identifiable undue financial or administrative burden on the City, however, this finding is made with an acknowledgment of the history of

code violations by the applicant. Plans on file with the City indicate that approximately 56 to 58 individuals could be housed at the three facilities if some rooms not labeled as "bedrooms" on plans were used as bedrooms. If resident populations were unregulated, and code violations continued, currently unidentifiable financial or administrative burdens could arise as a result.

4. **Finding: That the requested accommodation will not result in a fundamental alteration in the nature of a City program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.**

Facts do not support the finding. The State Fire Marshal made the determination that residential care occupancies with more than six residents have characteristics that require a degree of extra protection for their residents. Requirements for sprinklers, adequate egress, fire alarm pull stations and smoke alarms were adopted to provide a greater degree of life safety protection for a population of disabled individuals who live together. The Hearing Officer has determined that waiving such requirements would result in a fundamental alteration of the California Building Code because it undermines the basic purpose the California Building Code's life safety protections.

According to the current 2007 California Building Code, facilities such as the applicant's are considered as R4 occupancies. The California Building Code requires extra protection for R4 occupancies in recognition of the fact that the same disabilities that require federal fair housing protection may also impact or impede the disabled individual's ability to safely and quickly exit a building during a fire. The Hearing Officer has determined that waiving required life safety protections for residents of the facility would fundamentally undermine the basic resident safety standards the California Building Code seeks to achieve.

Granting the accommodation would also place neighboring properties at risk. The 2007 California Building Code requires that R4 occupancies have commercial sprinkler systems installed rather than residential sprinkler systems. Residential sprinklers are intended to protect the occupants of a residence and give them sufficient time to evacuate a building. Commercial sprinklers are intended to extinguish a fire and prevent it from spreading to other structures. The Hearing Officer has determined that waiving this requirement would undermine the basic purpose to provide fire protection to neighboring properties that the regulation seeks to achieve.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program.

- A. *Whether the requested accommodation would fundamentally alter the character of the neighborhood.*

- B. *Whether the accommodation would result in a substantial increase in traffic or insufficient parking.*
- C. *Whether granting the requested accommodation would substantially undermine any express purpose of either the City's General Plan or an applicable Specific Plan.*
- D. *In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

These factors pertain to Zoning Code issues rather than California Building Code issues; and therefore, were not analyzed as part of this request. These factors were analyzed in the applicant's Reasonable Accommodation Request No. 1, which was to apply the Zoning Code provisions to the properties in the same manner as a single housekeeping unit as defined in NBMC Section 20.03.030, and Request No. 2, which was to not treat or classify the properties as "Residential Care Facilities" as defined by NBMC Section 20.05.010.

5. **Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.**

Facts do not support the finding. Many of the California Building Code requirements, including the requirement for commercial sprinkler systems, were adopted to protect neighboring structures as much as facility residents. The Hearing Officer finds that granting the requested accommodation would result in a potential direct threat to the safety of neighboring properties and could result in substantial physical damage to the property of others.

WHEREAS, the project qualifies for a Categorical Exemption pursuant to Section (Section 15061(b)(3) (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby denies with prejudice Request No. 4 of Reasonable Accommodation No. 2008-001.

Section 2. This action shall become final and effective fourteen days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20 Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, APPROVED AND ADOPTED THIS 2ND DAY OF JULY, 2009.

By: _____

Thomas W. Allen

Thomas W. Allen, Hearing Officer

ATTEST:



Deputy

City Clerk

Shana Sanchez

TAB 11

Hearing Officer's
Resolution No. HO-2009-021 Denying
Request No. 5 of Pacific Shores' Reasonable
Accommodation Request

(July 2, 2009)

RESOLUTION NO. HO-2009-021

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITHOUT PREJUDICE REQUEST NO. 5 OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2008-001 FOR AN EXISTING SOBER LIVING FACILITY LOCATED AT 3309 CLAY STREET, 492 ORANGE AVENUE, AND 492 ½ ORANGE AVENUE (PA 2008-181).

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings; and

WHEREAS, the adoption of Ordinance No. 2008-05 amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

WHEREAS, Ordinance No. 2008-05 added Chapter 20.98 to the NBMC. Chapter 20.98 sets forth a process to provide reasonable accommodations in the City's zoning and land use regulations, policies, and practices when needed to provide an individual with a disability an equal opportunity to use and enjoy a dwelling; and

WHEREAS, an application was filed by Pacific Shores Properties, with respect to properties located at 3309 Clay Street, 492 Orange Avenue, and 492 ½ Orange Avenue, and legally described as Lot 2 and Lot 1 in Block 6 of Tract No. 27 in the City of Newport Beach, County of Orange, State of California (APN 425-282-02 and 425-282-01), requesting approval of the following five requests for reasonable accommodation:

1. That residents of its facility at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code;
2. That the City no longer classify or treat the properties at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as "Residential Care Facilities," as defined by NBMC Section 20.05.010;
3. That the City classify the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use;
4. That all code provisions applicable to the use of 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue (including Zoning Code, Building Code, fire safety and any other applicable code) be applied to those properties in the same manner that those codes are applied and enforced to single family and two family residential uses located in residential districts zoned R-2; and
5. That the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit.

WHEREAS, a public hearing was held on March 25, 2009, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and

purpose of the meeting was given in accordance with the Municipal Code. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Thomas W. Allen, Hearing Officer for the City of Newport Beach; and

WHEREAS, pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on findings, all of which are required for approval.

WHEREAS, with respect to Reasonable Accommodation Request No. 5, that the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit, not all of the five findings required can be made pursuant to Section 20.98.025 (B) of the NBMC, as follows:

1. **Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.**

Facts in support of finding. The applicant submitted a statement signed by the facility manager that every resident of the facility is in recovery from alcohol or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

2. **Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.**

While the dwelling unit at the subject facility located at 3309 Clay Street is not currently occupied, the applicant wishes to provide housing for residents in recovery upon resolution of code compliance issues. The dwelling units at the subject facility located at 492 and 492 ½ Orange Avenue are occupied. With all three dwelling units occupied, the applicant proposes to house up to 50 residents at the facility. Such land uses would be classified as "Residential Care Facilities, General" and pursuant to Ordinance No. 2008.005, are permitted in MFR (Multifamily Residential) Districts only, subject to approval of a use permit. Under Ordinance No. 2008-005, such nonconforming uses had the option to apply for a use permit within 90 days following the adoption of the ordinance, or be subject to abatement. As the abatement period established by NBMC Section 20.62.090(A)(2)(a) has passed and the facility chose not to apply for a use permit at this location, this facility is now subject to abatement by the City.

Facts in support of finding - As to current residents: There are currently no residents in the 3309 Clay Street building, but the duplex units on Orange Avenue are occupied. The

Hearing Officer finds that the facility at 492 and 492 ½ Orange Avenue currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility.

Facts do not support the finding - As to prospective residents: The Hearing Officer has determined this finding cannot be made at the population level requested by the applicant. The applicant seeks to house up to 50 disabled individuals in three dwelling units. It proposes 12 residents in one six- (or three) bedroom single-family home, 20 in an adjacent duplex with one 10- (or six) bedroom unit, and 18 in the 9-(or six) bedroom unit.¹ Prospective residents seeking a large sober living environment in Newport Beach have an ample supply from which to choose. Through implementation of the ordinance and this process, it is estimated approximately 233 sober living beds have been approved within the City, which could provide prospective residents of Pacific Shores with an equal opportunity to reside in this type of sober living environment. The applicant rejected a staff recommendation that the size of the facility be reduced from three dwelling units to one, with the population of that dwelling unit limited to no more than 12 resident clients, plus one on-site resident manager.

NBMC Section 20.98.025(C) allows the City to consider the following factors in determining whether a requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

- A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

The applicant's proposed population level of 50, with 20 residents in one dwelling, 18 in another, and 12 in a third, will likely lead to overcrowding, a condition that will not enhance the residents' quality of life. While living in a supportive environment with other recovering individuals has therapeutic benefits at certain population levels, living in a 50-person facility can also be detrimental to the recovery process of the residents. The purpose of community-based care is to allow residents to re-integrate into the community as their recovery progresses. An environment primarily comprised of others in recovery presents reduced opportunities to interact with non-disabled neighbors and re-learn the norms and standards of living as fully functioning members of society.

¹ Number of bedrooms reported by applicant. Plans filed with the City by the applicant show three rooms identified as bedrooms at 3309 Clay Street, and six bedrooms each in 492 and 492 ½ Orange Avenue. It has been assumed that rooms identified on plans as "sewing room," "office," "computer room," etc. are being used as bedrooms. Compliance with California Building Code requirements for bedrooms cannot be confirmed without inspection. Until this discrepancy is resolved, where the number of bedrooms is relevant to analysis, analysis is provided for the reported number of bedrooms, and the assumed number of bedrooms on the applicant's plans.

- B. *Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.*

Denial of the requested accommodation could result in abatement proceedings commencing against the facility. After abatement, current and potential residents of this facility could be denied the opportunity to live in a large three-dwelling sober living facility located in a residential district zoned for R-2 use. However, a number of similar facilities are located in the City offering sober living in two dwelling units on a single parcel. Operators of those alternate facilities have informed the City that they are currently occupied at approximately 50 percent of capacity. Therefore, recovering individuals who are denied housing at the subject facility have access to alternate housing opportunities of a similar type at other existing facilities.

- C. *In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

In its September 24, 2008 application for reasonable accommodation the applicant declined to provide information regarding this factor. Therefore, the number of residents required to make the facility financially viable cannot be established.

- D. *In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

In its September 24, 2008 application for reasonable accommodation, the applicant declined to address this factor. The applicant stated that the requested accommodation was necessary for the present and future residents of the facility to enjoy the housing of his or her choice. The City has estimated that there are approximately 233 approved sober living beds in the City. There are many existing facilities that provide sober living environments that occupy more than one unit of a building, or are adjacent to other sober living facilities with a similar client/bedroom ratio, assuming all the bedrooms reported by the applicant prove to meet code requirements for bedrooms. If not, the applicant's proposed population would be substantially more densely populated than a typical 12-person facility found in other areas of the City such as the Balboa Peninsula and West Newport areas.

3. **Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.**

Facts in support of finding - As to current residents: While the applicant did not report the average length of resident stay, other sober living facilities have reported that their resident stays range from 45 days to 180 days, with an average stay of 90 days. Assuming the applicant's facility has similar lengths of resident stays, the Hearing Officer has determined that allowing current residents to remain at the facility for the remainder of their stay will not impose an undue financial or administrative burden on the City.

Facts do not support the finding - As to prospective residents: At the applicant's proposed population level, this finding cannot be made. In most cases, allowing a facility to remain at its current location when it is necessary to provide disabled individuals with an equal opportunity to use and enjoy a dwelling would not impose an undue financial or administrative burden on the City. However, due to the 2007 illegal construction at 3309 Clay Street, the ongoing delays in obtaining applicant's compliance with Building Code requirements, complaints received from neighbors about the intensity of facility use, the applicant's violation of the 2007 moratorium at 492 Orange Avenue, and the applicant's history of obfuscation regarding the type of use occurring at the facility, substantial financial and administrative burdens have already been incurred with regard to this facility.² The Hearing Officer has determined that if the facility continues at the same intensity of use, negative secondary impacts on neighboring properties seem likely, and the City will have to expend additional resources to get the applicant to reduce those impacts.

4. **Finding: That the requested accommodation will not result in a fundamental alteration in the nature of the City's zoning program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.**

Facts in support of the finding - As to current residents: As the abatement period established by NBMC Section 20.62.090(A)(2)(a) has passed and the facility chose not to apply for a use permit at this location, this facility is now subject to abatement by the City. While the applicant did not report the average length of resident stay, other sober living facilities have reported that their resident stays range from 45 days to 180 days, with an average stay of 90 days. Assuming the applicant's facility has similar lengths of resident stays, the Hearing Officer has determined that allowing current residents to remain at the facility for the remainder of their intended stay will not result in a fundamental alteration in the nature of the City's zoning program.

Facts do not support the finding - As to prospective residents: At the applicant's proposed population level, the Hearing Officer has determined that this finding cannot be made.

² In 2007, applicant's representative Mark Manderson, Sr. informed a City Code Enforcement officer verbally and in writing, and an ADP complaint officer verbally, that Pacific Shores was renting rooms to tenants and was not a recovery facility. Code Enforcement resources were required to clarify whether the property was being used as an illegal boarding house, or as housing for disabled individuals. In addition, the applicant's May 2007 moratorium violation led the City to file a state court action against the applicant, which incurred additional financial burden.

Ordinance No. 2008-05 places regulations on all groups not living in either a single housekeeping unit or a residential care facility classified as "Residential Care Facilities, Small Licensed." The basic purpose of these regulations is to ensure that the fundamental purposes of the NBMC can be achieved, and to mitigate adverse secondary impacts residential care facilities may have on the surrounding neighborhood.

The applicant has applied for reasonable accommodation requesting that the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit. Section 20.10.20 of the NBMC, "Land Use Regulations," prohibits large residential care facilities within the R-2 District and permits these facilities in the MFR District subject to approval of a use permit. Ordinance No. 2008-05 was adopted to regulate large residential care facilities and states that such nonconforming facilities are subject to abatement unless the owner or occupant of the facility has timely applied for a use permit or reasonable accommodation pursuant to Chapter 20.91.A or Chapter 20.98 of the NBMC.

Purpose and intent of establishing two-family and multi-family residential zoning districts

The basic purposes NBMC Chapter 20.10 seeks to achieve are set forth in NBMC Section 20.10.010. Those purposes include locating residential development in areas which are consistent with the General Plan and with standards of public health and safety established by the Municipal Code, ensuring adequate light, air and privacy for each dwelling, protecting residents from the harmful effects of excessive noise, population density, traffic congestion and other adverse environmental effects, and providing public services and facilities to accommodate planned population and densities.

The specific purpose of the Two-Family Residential (R-2) District is to provide "areas for single-family and two-family residential land uses," and purpose of the MFR District is to provide areas

for medium-to-high density residential development up to approximately 36 dwelling units per gross acre, including single-family (attached and detached), two-family and multi-family." Residential districts in the Newport Heights area zoned R-2 provide for medium-density development."

The applicant requests the ability to house 50 residents in the three dwellings at the facility. Thirty-eight residents are proposed for a single parcel resulting in a high level of population density. The Hearing Officer has determined that permitting the facility to remain in its current location in the R-2 District at the applicant's proposed population level would undermine the City's basic zoning program, the purpose of which is to group uses of similar densities in the same zoning districts.

Purpose and intent of the use permit requirement

Use permits are required by the Municipal Code for use classifications typically having operating characteristics that require special consideration, so that they may be located and operated compatibly with uses on adjoining properties and in the surrounding area. NBMC Section 20.91A.010 sets forth the purposes of requiring use permits in residential districts. The first stated purpose is:

"... to promote the public health, safety, and welfare and to implement the goals and policies of the Newport Beach General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods as primarily residential communities."

The second purpose is:

"... to protect and implement the recovery and residential integration of the disabled, including those receiving treatment and counseling in connection with dependency recovery. In doing so, the City seeks to avoid the overconcentration of residential care facilities so that such facilities are reasonably dispersed throughout the community and are not congregated or over-concentrated in any particular area so as to institutionalize that area."

Even if the facility is exempted from Section 20.10.020 and permitted to remain in its current location without a use permit, it is not exempt from reasonable controls the City might place on it. NBMC Section 20.98.015 states that the Hearing Officer shall approve, *conditionally approve* or deny applications for reasonable accommodation. The Hearing Officer may impose the same conditions through the reasonable accommodation process that it can impose under through the use permit process. A reasonable accommodation with appropriate conditions can mitigate adverse secondary impacts such as noise, overcrowding, parking and traffic impacts, excessive second-hand smoke, and unruly behavior by residents of applicant's facility to the detriment of neighbors.

There are situations where the reasonable accommodation mandates of fair housing laws require the Hearing Officer to grant an exemption from the use permit requirement. However, these situations should be limited to those in which the applicant can demonstrate that the accommodation would not undermine the basic purposes of the use permit requirement by demonstrating that:

- (a) the applicant's facility can meet all standards required for issuance of a use permit, including the operational standards of NBMC Section 20.91A.050, and the required findings of NBMC Sections 20.91A.060 and 20.91.035(A); or

(b) if all standards required for issuance of a use permit cannot be met, or required findings made, the applicant can demonstrate that in its particular case the inability to meet a specific standard or make a required finding does not undermine either of the two basic purposes of the use permit requirement; and

(c) the applicant is willing to meet conditions that would have been required under a use permit to ensure that the character of the surrounding neighborhood is not changed, and that residential care facilities are reasonably dispersed throughout the community and are not congregated or over concentrated in any particular area so as to institutionalize that area.

The Hearing Officer finds that the applicant is unable to meet the standard stated in Section 20.91A.050(C)(4). This subsection establishes a requirement that all persons with an ownership or leasehold interest in the facility, or who will participate in the operation of the facility, shall not have a demonstrated pattern or practice of operating similar facilities in violation of state or local law. Therefore, the finding that the accommodation will not result in a fundamental alteration of the nature of the City's zoning program cannot be made. In 2007, the dwelling at 3309 Clay Street housed either sober living residents or a prohibited Group Residential use in a dwelling with unpermitted construction. The dwelling at 3309 Clay Street appeared to be used by more than six residents in 2007, in violation of the NBMC requirement at that time that unlicensed facilities with more than six residents must apply for and receive a Federal Exception Permit (FEP) to establish such uses. The use at 492 Orange Avenue was established during 2007 the moratorium. Also in 2007, one facility manager made false statements to both City and state code enforcement officers and inspectors. This same manager has a long-standing history of establishing illegal units in other areas of the City. The City regards illegal dwelling units as one form of prohibited Group Residential or boarding house use, as it results in groups not living as a single housekeeping unit in what was originally intended to be a single dwelling unit. The applicant did not demonstrate that the facility manager's past practices of housing tenants in buildings with illegal construction and illegal units, as well as ignoring the City's moratorium ordinance, would not undermine the basic purpose of the use permit requirement.

Furthermore, the applicant was not willing to meet certain conditions that would have been required under a use permit. One of the stated purposes of a use permit for uses in residential districts is to ensure that the character of the surrounding neighborhood is not changed, and that residential care facilities are reasonably dispersed throughout the community and are not congregated or over-concentrated in any particular area so as to institutionalize that area. The Hearing Officer has the discretion to apply any degree of separation of uses which he or she deems appropriate in any given case, and to apply the American Planning Association (APA) standard of permitting one or two uses per block. At the applicant's proposed population level of 50 residents, the Hearing Officer finds it is unlikely that a reasonable accommodation with conditions similar to those imposed through a use permit could ensure that the primarily residential character of the neighborhood is not

changed. With 50 people in three adjacent buildings, the facilities are not reasonably dispersed throughout the community, and are concentrated in a specific area to a degree that institutionalizes that area.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program:

- A. *Whether the requested accommodation would fundamentally alter the character of the neighborhood.*

At the population levels proposed by the applicant nearly one-quarter of the block that fronts Clay Street would be transformed into a large residential care facility with up to 50 residents thereby fundamentally altering the character of the neighborhood.

- B. *Whether the accommodation would result in a substantial increase in traffic or insufficient parking.*

The dwelling addressed as 492 Orange Avenue includes an attached tandem two-car garage, and the dwelling addressed as 492 ½ Orange Avenue includes a two-car garage (side-by-side parking spaces). The parcel located at 3309 Clay Street is developed with a single-family dwelling with an attached tandem two-car garage. The on-site parking provided at each building is consistent with the Zoning Code requirement for single-family and two-family residential development. However, the NBMC requires that a residential care facility provide one on-site parking space for every three residential care beds. At the applicant's proposed population of 50 residents, 17 on-site parking spaces are required. The facility provides only six. The off-street parking requirements in R-2 zoning districts were not intended to accommodate a use of density proposed, and the on-street parking was not designed to accommodate the degree of overflow parking that would result from a use of this intensity. The operations and management of the facility require the use of on-street parking for residents, staff, and visitors which impacts the availability of on-street parking for use by residents of the subdivision. In addition, meetings held at one or more of the facilities are served by on-street parking, further impacting the availability of on-street parking for use by residents of the subdivision.

The Institute of Transportation Engineers (ITE) establishes standards for trip generation rates based on the use classification of a site. For a single-family home, the standard trip rate is 9.57 average daily trips per dwelling. For a duplex, the standard trip rate is 6.72 average daily trips per dwelling unit. Trip rates for residential care facilities are 2.74 average daily trips per each occupied bed. At the applicant's proposed population level and based on the ITE standards, a 50-bed residential care facility would generate approximately 137 average daily trips. A duplex would

generate approximately 13.44 average daily trips. A single-family home would generate approximately 9.57 average daily trips per dwelling. If occupied by single housekeeping units, the ITE formula projects a total of 23.01 average daily trips for one single-family dwelling and the two units of the duplex. The evidence shows this facility will generate trips substantially in excess of average daily trips of the single housekeeping units in surrounding duplexes and single-family homes.

- C. *Whether granting the requested accommodation would substantially undermine any express purpose of either the City's General Plan or an applicable Specific Plan.*

General Plan Policy LU 6.2.7 requires the City to regulate day care and residential care facilities to the maximum extent allowed by federal and state law. A request for reasonable accommodation is consistent with this policy. The City adopted Ordinance No. 2008-005 in order to implement General Plan Policy LU 6.2.7. Granting the reasonable accommodation request to waive the requirement that unlicensed residential care facility may only be located in a MFR District with a use permit, without imposing operational conditions similar to take of a use permit would undermine the General Plan.

- D. *In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

There are no other documented facilities, similar in nature or operation to the subject facility, within the vicinity of the subject facility. In considering whether granting the requested accommodation would create an institutionalized environment, however, it is noted that at the applicant's proposed occupancy, approximately 56 to 58 individuals could be housed at the three subject facilities if some rooms, not currently labeled as "bedrooms" on the plans on file at the City, were used as bedrooms. An unregulated occupancy of the facility would result in an overconcentration of the use of the facility and the potential institutionalization of the residential neighborhood with associated adverse secondary impacts such as noise, overcrowding, unruly behavior by residents of the facility, a disproportionate utilization of available on-street parking by the facility, and traffic impacts.

5. **Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.**

Facts in support of the finding. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others," (See 42 U.S.C. § 3604(f)(9)). This is a

very limited exception and can only be used when, based on the specific facts of a situation, a requested accommodation results in a significant and particularized threat. Federal cases interpreting this exception in the FHAA indicate that requested accommodations cannot be denied due to generalized fears of the risks posed by disabled persons.

WHEREAS, the project qualifies for a Categorical Exemption pursuant to Section (Section 15061(b)(3) (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby denies without prejudice Request No. 5 of Reasonable Accommodation No. 2008-001.


Section 2. This action shall become final and effective fourteen days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20 Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, APPROVED AND ADOPTED THIS 2ND DAY OF JULY, 2009.

By: 
Thomas W. Allen, Hearing Officer

ATTEST:




Deputy City Clerk

TAB 12

**Pacific Shores' Appeal from Hearing
Officer's Denial of Reasonable
Accommodation**

(August 3, 2009)

Brown, Leilani

From: Steven Polin [spolin2@earthlink.net]
Sent: Monday, August 03, 2009 8:23 PM
To: Brown, Leilani; pbobko; Kiff, Dave
Cc: Chris Brancart; ebrancart@brancart.com; james dee; Mark Manderson; Dana (CRT)
Mulhauser; paul.e.smith
Subject: Pacific Shores appeal
Attachments: AppealofHearingOfficersDecision res.5.pdf; AppealofHearingOfficersDecision res. 1.pdf;
AppealofHearingOfficersDecision res. 2.pdf; AppealofHearingOfficersDecision res. 3.pdf;
AppealofHearingOfficersDecision res.4.pdf

Ms. Brown, please find attached Pacific Shore's appeals of the decision of Hearing Officer Thomas Allen denying its request for a reasonable accommodation in accordance with NBMIC 20.94.40. Please do not hesitate to contact me if you have any questions or need additional information.

Thank you.

Steve Polin

Steven Polin
Law Office of Steven G. Polin
3034 Tennyson Street, NW
Washington, DC 20015
202-331-5848
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spolin2@earthlink.net

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CITY OF NEWPORT BEACH

APPLICATION TO APPEAL DECISION OF THE HEARING OFFICER

Project No. PA 2008-181 Application No. HO-2009-019
Name of Appellant Pacific Shores Properties Phone 202-331-5848
Site Address 3309 Clay Street, 492 Orange Avenue, 4921/2 Orange Avenue
Date of Hearing Officer's decision July 22*, 20 09
Name of Applicant Pacific Shores Properties for

(Description of application filed with Hearing Officer) Request for a reasonable accommodation
that the City treat the aforementioned properties as a legal non conforming use
by "grandfathering" the use of properties as in compliance with the NBMC prior to the adoption
of Ordinance 2008-005

Reasons for Appeal Granting the request in part and denying in part, by failing to "grandfather" the use of the properties
of the City Council to hear this appeal by virtue of the fact that the denial of the request was dated July 2, 2009, but the applicant was not given notice of the denial.

*By letter dated July 22, 2009, the City notified applicant that the appeal period runs from the date of the letter notwithstanding the provision of NBMC 20.05.040.

Steven G. Polin

Digitally signed by Steven G. Polin
DN: cn=Steven G. Polin, o=City of Newport Beach, ou=City of Newport Beach, email=s.polin@cityofnewportbeach.org, c=US
Date: 2009.08.03 22:44:28 -0400

Signature of Appellant

08/03/2009

Date

FOR OFFICE USE ONLY:

Debra L. Brown
Received by

[Signature]
Fee received

8/3/09
Date

CITY OF NEWPORT BEACH

APPLICATION TO APPEAL DECISION OF THE HEARING OFFICER

Project No. PA 2008-181 Application No. HO-2009-020
Name of Appellant Pacific Shores Properties Phone 202-331-5848
Site Address 3309 Clay Street, 492 Orange Avenue, 4921/2 Orange Avenue
Date of Hearing Officer's decision July 22*, 20 09
Name of Applicant Pacific Shores Properties for

(Description of application filed with Hearing Officer) Request for reasonable accommodation that the City
apply all code provision to the use of the aforementioned properties, including but not limited to zoning, building, fire safety
and any other applicable codes be applied in the same manner that those codes are applied and enforced to single family
and two family residential uses located in residential districts zoned R-2.

Reasons for Appeal Denial of the request with prejudice. *Pacific Shores Properties does not waive its right to challenge the jurisdiction
of the City Council to hear this appeal by virtue of the fact that the denial of the request was dated July 2, 2009, but the applicant was not given notice of the denial.
By letter dated July 22, 2009, the City notified applicant that the appeal period runs from the date of the letter notwithstanding the provision of NBMC 20.05.040.

Steven G. Polin

Digitally signed by Steven G. Polin
DN: cn=Steven G. Polin, o=ps, email=spolin2@earthlink.net, c=US
Date: 2009.08.03 22:58:42 -0400

Signature of Appellant

08/03/2009

Date

FOR OFFICE USE ONLY:

Received by

Michael L. Brown

Fee received

J

Date

8/3/09

CITY OF NEWPORT BEACH

APPLICATION TO APPEAL DECISION OF THE HEARING OFFICER

Project No. PA 2008-181 Application No. HO-2009-021
Name of Appellant Pacific Shores Properties Phone 202-331-5848
Site Address 3309 Clay Street, 492 Orange Avenue, 4921/2 Orange Avenue
Date of Hearing Officer's decision July 22*, 20 09
Name of Applicant Pacific Shores Properties for

(Description of application filed with Hearing Officer) Request for reasonable accommodation that the City
waive the requirement of NBMC 20.91A.020 that unlicensed residential care facilities may
be located only in a residential district zoned MFR with a use permit.

Reasons for Appeal Denial of the request with prejudice. *Pacific Shores Properties does not waive its right to challenge the jurisdiction
of the City Council to hear this appeal by virtue of the fact that the denial of the request was dated July 2, 2009, but the applicant was not given notice of the denial
By letter dated July 22, 2009, the City notified applicant that the appeal period runs from the date of the letter notwithstanding the provision of NBMC 20.05.040.

Steven G. Polin

Signature of Appellant

Digitally signed by Steven G. Polin
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Date: 2009.08.03 22:55:46 -0400

08/03/2009

Date

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Debra L. Brown
Received by

σ
Fee received

8/3/09
Date

CITY OF NEWPORT BEACH

APPLICATION TO APPEAL DECISION OF THE HEARING OFFICER

Project No. PA 2008-181 Application No. HO-2009-17
Name of Appellant Pacific Shores Properties Phone 202-331-5848
Site Address 3309 Clay Street, 492 Orange Avenue, 4921/2 Orange Avenue
Date of Hearing Officer's decision July 22*, 20 09
Name of Applicant Pacific Shores Properties for

(Description of application filed with Hearing Officer) _____
that the residents of the aforementioned addresses be treated as a single
housekeeping unit

Reasons for Appeal Denial of the request with prejudice. *Pacific Shores Properties does not waive its right to challenge the jurisdiction
of the City Council to hear this appeal by virtue of the fact that the denial of the request was dated July 2, 2009, but the applicant was not given notice of the denial.
By letter dated July 22, 2009, the City notified applicant that the appeal period runs from the date of the letter notwithstanding the provision of NBMC 20.05.040.

Steven G. Polin

Digitally signed by Steven G. Polin
DN: cn=Steven G. Polin, o, ou, email=spolin2@earthlink.net, c=US
Date: 2009.08.03 22:23:34 -0400

Signature of Appellant

08/03/2009

Date

FOR OFFICE USE ONLY:

Richard L. Brown
Received by

[Signature]
Fee received

8/3/09
Date